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February 28, 2020

Ms. Vanessa Countryman  
Secretary  
US Securities and Exchange Commission  
100 F Street NE  
Washington DC 20549-1090

Re: Notice of Proposed Order Directing the Exchanges and FINRA to Submit a New National Market System Plan Regarding Consolidated Equity Market Data (File No. 4-757)

Dear Ms. Countryman:

The Investment Company Institute<sup>1</sup> strongly supports the SEC’s proposed order to reform the governance of the national market system (“NMS”) plans and consolidate the three current plans into a single NMS plan (“New NMS Plan”) (the “Proposed Order”).<sup>2</sup> The three NMS plans currently govern the securities information processors (“SIPs”) distributing consolidated market data. We long have supported reforming the NMS plans’ governance system, and, consistent with the goals of the national market system, the Proposed Order outlines several important enhancements to the distribution of consolidated market data.<sup>3</sup> We therefore applaud the Commission’s initiative.

#### Non-SRO Voting Representation

The exchanges and FINRA currently are the only entities with voting power with respect to the NMS Plans. The Proposed Order would require the New NMS Plan to include voting representatives from entities unaffiliated with self-regulatory organizations (“SROs”) on the new operating committee—namely a representative from an institutional investor such as an asset manager, a broker-dealer focused

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<sup>1</sup> The [Investment Company Institute](#) (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI’s members manage total assets of US\$25.2 trillion in the United States, serving more than 100 million US shareholders, and US\$7.0 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

<sup>2</sup> Securities Exchange Act Release No. [87906](#), 85 FR 2164 (Jan. 14, 2020).

<sup>3</sup> 15 U.S.C. 78k-1.

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on retail investors, a broker-dealer focused on institutional investors, a securities market data vendor, an issuer, and a retail investor.<sup>4</sup>

We support expanding the operating committee and amending the voting structure of the New NMS Plan to allocate one-third of the voting power to these new operating committee representatives. As we stated in 2016, the governing bodies of the NMS plans for consolidated market data and quotations (“SIP data”) “would be far better informed—and less influenced by conflicts of interest — if they include non-SROs.”<sup>5</sup>

Investors, including ICI members, submit the bids and offers that comprise SIP data. Investors also are the primary consumers of SIP data because they are required to be shown a consolidated display of a stock market’s data when making trading or order routing decisions under the Vendor Display Rule.<sup>6</sup> Yet, remarkably, despite both supplying and using, SIP data, the investment community currently does not have voting representation on the NMS plans operating the SIPs.

The significant conflicts of interest of the SIPs’ exchange administrators amplify the consequences of this lack of representation. The exchanges’ incentives are to maximize the revenues of their proprietary data products which directly compete with SIP data. This has led to the SIP becoming an inferior market data product that the investment community must pay for, at rates determined in the first instance by the exchanges, without an effective voice to promote change.

We strongly disagree with the assertion by NYSE Group, Inc., or NYSE, that the Commission “does not have statutory authority either to require SROs to act jointly with non-SROs or to provide non-SROs with voting authority in NMS plans.”<sup>7</sup>

Securities Exchange Act Section 11A grants the Commission pervasive authority, stating that, “having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly

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<sup>4</sup> We suggest that the New NMS Plan specify that the retail investor acting as the non-SRO voting representative be a generally informed market participant that is familiar with the purposes and use of the SIP. Doing so will help assure that the representative will be equipped to effectively represent the interests of retail investors.

<sup>5</sup> See [Letter](#) from Paul Schott Stevens, President & CEO, ICI, to Mary Jo White, Chair, Commission (Oct. 19, 2016) at 2-3 and [Letter](#) from Dorothy M. Donohue, Deputy General Counsel, ICI, to Vanessa A Countryman, Secretary, Commission (Dec. 10, 2019) at 4.

<sup>6</sup> 17 CFR 242.603. See also BATS Global Markets Inc., [Denial of No-Action Request under Rule 603\(c\) of Regulation NMS](#) (July 22, 2015) (denying requested relief to allow trading decisions to be made where only a subset of SIP data is displayed to an investor).

<sup>7</sup> See [Letter](#) from Elizabeth K. King, General Counsel and Corporate Secretary, NYSE, to Vanessa Countryman, Secretary, Commission re: File No. 4-757 (Feb. 5, 2020) at 12 (“NYSE Letter”).

markets” to carry out the goals of, among other things, assuring “economically efficient execution[s]” and the availability “of information with respect to quotations for and transactions in securities.”<sup>8</sup>

To responsibly exercise this authority, the Commission is authorized in registering a SIP to prescribe requirements relating to performance capability, standards and procedures, personnel qualifications, financial condition and “such other matters as the Commission determines to be germane to the provisions of this chapter . . . or necessary or appropriate in furtherance of the purposes of this section.”<sup>9</sup> The governance structure of SIPs and the NMS Plans that govern them clearly are within the ambit of “such other matters” as the Commission might believe are germane to carry out Congress’s overarching goal of establishing a national market system in the public interest.

Congress plainly contemplated the Commission having authority under Section 11A to require that the New NMS Plan include non-SRO representatives. NYSE’s objection to providing non-SRO representatives with any voting authority, even where the SROs would retain effective voting control over the operating committee, starkly demonstrates the conflict of interests that for-profit exchanges face in operating the SIPs.<sup>10</sup>

NYSE argues that providing non-SROs with a voting interest would be contrary to the statute because SROs are “legally bound to only advance NMS plans that are in the public interest,” while non-SRO voting representatives would have no such obligation.<sup>11</sup> It is truly ironic that an entity that is legally bound to vote in the public interest would object to hearing from, including by means of voting, that same public. Investment advisers in particular have a long history of acting in a fiduciary capacity to represent the public interest of the millions of investors for whom they manage assets, and we respectfully submit that this history compares favorably with history of for-profit, shareholder-owned exchanges administering the SIP in the public interest.

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<sup>8</sup> 15 U.S.C. 78k-1. *See also* H. Rep. No. 94-229, 94th Cong., 1st Session 93 (May 1975) (Conference Report on 1975 Acts Amendments) (“the SEC was given pervasive rulemaking power to regulate securities communications systems, e.g., securities information processors, thus bringing directly under the SEC’s jurisdiction all organizations engaged in the business of collecting, processing, or publishing information relating to quotations for and transactions in securities”); *id.* at 97 (in discussing National Market Regulatory Board to oversee implementation of the national market system, “the conferees expect that in making appointments the Commission will select persons from different segments of the industry. In choosing nonindustry members to the Board, the conferees again expect adequate representation to be given, to the maximum extent practicable, to investors, both small and large, issuers, vendors, and other persons who will be affected by the national market system”); *cf. id.* at 98 (requiring public representatives on the boards of directors of all national securities exchanges and registered securities associations).

<sup>9</sup> *Id.*

<sup>10</sup> Under the Proposed Order, the SROs would retain two-thirds of the voting power and maintain control over the New NMS Plan’s operation through augmented majority voting which requires in all cases at least a majority of the SRO votes. Proposed Order at 2181.

<sup>11</sup> NYSE Letter at 15.

Further, including independent, or otherwise conflict-free, parties in governance structures is a common and accepted method of assuring adequate oversight of entities like the SIPs. Indeed, NYSE itself has, like all other exchanges, adopted a board structure with a majority of independent directors, and requires NYSE-listed public companies likewise to have a majority of independent directors.<sup>12</sup> And, more practically speaking, introducing new, unconflicted voting representatives could provide different, yet valuable, perspectives that may lead to more balanced decision making, which ultimately will benefit the public interest. Nonetheless, we would not object to a provision in the New NMS plan explicitly providing that non-SRO voting representatives have a duty to act in good faith and in the public interest in furtherance of the purposes of Section 11A.

### Exchange Act Voting Power

The Commission proposed reducing the voting power of exchange groups to a single vote, with the ability to obtain a second vote if they maintain consolidated equity market share of at least 15% for at least four of the six calendar months preceding a vote of the operating committee. We support this aspect of the Proposed Order.

NYSE contends that the Commission “provides no rationale for stripping affiliated SROs of voting power, except the observation that affiliated SROs are likely to vote in unison.”<sup>13</sup> We disagree with this assertion. In fact, the Commission explicitly provides a rationale: the need to rebalance the voting power to reduce the disproportionate influence of exchange groups.

Presently, any two exchange groups can command a majority vote, and because those exchange groups sell market data products that compete with SIP data, they have significant conflicts of interest. This unequivocally provides a strong incentive for the exchanges, as for-profit businesses, to maximize the profit from their competing products at the expense of maintaining the vibrancy of SIP data.

NYSE conspicuously provides no evidence that its five exchanges (or other exchange groups) do *not* vote in unison. To the contrary, NYSE tellingly writes in a unified voice on behalf of all five of its SROs, which could reflect how it might approach voting on SIP operating committee matters. Indeed, we are not aware of a single instance when members of *any* exchange group have ever voted against one another on a SIP issue. Even if it could be demonstrated that the exchange groups do not invariably vote in unison, it greatly matters that they have the ability to do so. The Commission has appropriately

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<sup>12</sup> Similarly, Commission rules require that registered investment companies relying on common exemptive rules have boards with a majority of independent directors. As of 2018, 84% of fund complexes reported that they exceed this requirement with independent directors holding 75% or more of board seats. See Investment Company Institute and Independent Directors Council, *Oversight of Fund Governance Practices, 1994-2018* (Oct. 2019) at 1, available at [https://www.ici.org/pdf/19\\_pub\\_fund\\_governance.pdf](https://www.ici.org/pdf/19_pub_fund_governance.pdf)

<sup>13</sup> NYSE Letter at 17.

recognized that the current ability for any two exchange groups to command a majority at any time on any issue is greatly problematic.

Moreover, the existing structure of one-SRO/one-vote provides NYSE with a disproportionate voting power relative to each exchange's trading volume. NYSE's parent, Intercontinental Exchange, Inc., acquired Chicago Stock Exchange, Inc. and National Stock Exchange, Inc. within the past three years. These two exchanges today generally combine for less than 3% of total trading volume but represent 12% of voting power on the SIP operating committees. When this voting power is added to NYSE's existing three votes, NYSE is able to command 29% of the operating committees' vote. This compares to the 18% voting power they had prior to acquiring these exchanges.<sup>14</sup>

We believe that tying an exchange group's voting power to its volume and capping exchange group voting power at two votes is a reasonable way to prevent exchange groups from gaining an outsized influence over the governance of the New NMS plan while ensuring that exchange groups with significant volume are fairly represented. Importantly, the two-vote cap also would deter establishing new exchanges for the sole purpose of gaining additional voting power on the operating committee. It also would deter exchanges from consolidating further into groups, which could, in turn, further competition among the exchanges.<sup>15</sup>

#### Independent Administrator

The Proposed Order would require a SIP to have an independent administrator that does not sell competing market data products. This is an essential requirement that we strongly support. Unlike the exchanges, an independent administrator would not have as a competing objective maximizing the profitability of its own proprietary data products as the expense of the SIP and its users.

We would not object to FINRA being the administrator. In reaching this position, we recognized that FINRA would not face the same conflicts of interest as exchanges because it does not sell proprietary equity market data. We also accounted for the fact that FINRA is a logical choice given that it recently assumed responsibility for administering the Consolidated Audit Trail, or CAT. That said, some members were reticent for us to support FINRA as the administrator, instead preferring greater diversity among the range of entities performing the critical market functions associated with administering NMS plans. If the Commission does permit FINRA to administer the New NMS plan, we urge the Commission to encourage FINRA to engage in dialogue with the investment company

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<sup>14</sup> The Nasdaq, Inc. exchange group's ISE, which no longer offers equities trading, still has a vote, which further demonstrates the flawed governance system.

<sup>15</sup> 15 U.S.C. 78c(f) (requiring that whenever the Commission is engaged in rulemaking, or in the review of a rule proposal submitted by a SRO, the Commission must consider whether the action will promote efficiency, competition, and capital formation); *cf.* 15 U.S.C. 78f(b)(8).

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industry with respect to administration of the SIP, which it has been reluctant to do with respect to its administration of the CAT.

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In sum, we believe that the Proposed Order would substantially improve the governance of the SIP, which should enhance both the operations of the SIP and the quality of SIP data. However, while we support the Proposed Order, we share Commissioner Lee's concerns about the delays that may arise in implementing these essential reforms.<sup>16</sup> We therefore urge the Commission to take steps to ensure that these reforms are completed timely for the benefit of all market participants consistent with Section 11A of the Exchange Act, including by monitoring closely the progress and potentially penalizing the SROs for unwarranted delays.<sup>17</sup> The Commission could do so either through fines or not allowing the SROs to collect SIP fees for some period of time.

We appreciate the opportunity to comment and look forward to commenting on the Commission's most recent proposals to improve market data infrastructure, many aspects of which are consistent with prior ICI recommendations.<sup>18</sup> If you have any questions, please contact me at (202) 218-3563.

Regards,

/s/ Dorothy Donohue  
Deputy General Counsel, Securities Regulation

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<sup>16</sup> See Commissioner Allison Herren Lee, [Statement on Proposed Order for Creation of a New Consolidated Market Data Plan for Equity Market Data](#) (Jan. 8, 2020) ("I am very concerned that we may never see a full package of necessary reforms implemented. Today we issue a proposed order related to governance, which order may or may not be finalized, to seek future proposals from the stock exchanges, which proposals may or may not be sufficient or finalized").

<sup>17</sup> 15 U.S.C. 78k-1.

<sup>18</sup> See Market Data Infrastructure, Release No. 34-88216 (Feb. 14, 2020), *available at* <https://www.sec.gov/rules/proposed/2020/34-88216.pdf>.

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cc: The Honorable Jay Clayton  
The Honorable Hester M. Peirce  
The Honorable Elad L. Roisman  
The Honorable Allison Herren Lee

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